BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The opinion (Trans., 88-101) in the United States District Court for the Eastern District of Tennessee, Northern Division, is reported in 28 Fed. Supp. 732. The opinion in the United States Circuit Court for the Sixth Circuit was issued on December 6, 1940, and is reported in 115 Fed. (2d) 990.

II.

1. The date of the judgment to be reviewed is December 6, 1940.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is United States Code, Section 347. (Judicial Code, Section 240, amended.)

3. The case involves the interpretation of Article I, Secs. 1, 7, 8 and Article II, Sections 1 and 2 of the Constitution of the United States and of the Acts of Congress known as (a) The Act of May 18, 1933, c. 32, 48 Stat. 58 (1933), 16 U. S. C., Secs. 831 ff. (1934) and (b) The Act of August 31, 1935, c. 836, 49 Stat. 1075 (1935), 16 U. S. C. Supp. IV, Secs. 831 c. ff. (1938).

4. The cases believed to sustain said jurisdiction are as follows:

Forsyth v. *City of Hammond,* 166 U. S. 506;
Myers v. *United States,* 272 U. S. 52;
Humphrey's Executor v. *United States,* 295 U. S. 602.

III.

Statement of the Case.

This has already been stated in the Petition for Certiorari filed herein, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the complaint did not state a cause of action.

2. In holding that the President of the United States had lawful authority to remove petitioner as a member and chairman of the Tennessee Valley Authority, for the reasons stated in his letter to the petitioner dated March 22, 1938 (Trans., 56-57).

3. In holding that the act of the President of the United States constituted a lawful removal of petitioner as a member and chairman of the Tennessee Valley Authority.

MEMORANDUM OF POINTS.

V.

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals bases its decision upon two distinct grounds: (1) that Sections 4(f) and 6 of the Tennessee Valley Authority Act of 1933 disclose no intent on the part of Congress in any way to limit the power (inherent in or implied from his power to appoint) of the President to remove the Directors of the Tennessee Valley Authority, and (2) that the Authority is simply an administrative arm of the executive department and hence that the rule of *Humphrey's Executor* v. *United States,* 295 U. S. 602, does not apply. Obviously either ground, if valid, would dispose of the case.

If this decision stands it means that the Congress is wholly impotent to create an independent agency with powers amply broad to plan and administer the improvement of the navigable streams, the agricultural and other resources and the social and economic condition of a vast area extending to seven States—an area containing more than one sixth of the population of the United States. It means that the President may at any time change the entire direction of the planning and administration of this vast project (and other similar projects) by the very simple method of removing its directors for any cause or for no cause. It means that every such project, with powers in certain respects almost as broad as state government itself, may not be created by the Congress and made responsible only to Congress. This must follow if the Congress may not limit the power of the

President to remove—a power not expressly granted to the President by the Constitution or Statute, but which must be found, if at all, by inference or implication.

What Is the Tennessee Valley Authority?

The Tennessee Valley Authority is *an independent corporation* created by Congress and empowered to exercise functions, a large part of which Congress might well exercise itself. Its directors are not in a strict sense "officers of the United States". They are clothed with large powers of planning and administration and with wide discretion in their exercise.

The Act contemplates the location and building of dams, the improvement of navigable rivers, and the manufacture and sale of electric power. The control of navigable streams is peculiarly a function of Congress, which it may exercise itself or may delegate within certain limits. When so delegated it is still legislative or quasi-legislative power. The directors of the Authority exercise that power. Quasi-legislative power is simply legislative power which properly may be delegated to an official, officials, or agency outside of Congress.

This Court has held that the water power generated by the dams in the Tennessee River is to be converted by the Authority into electric energy and that the electric energy thus produced constitutes property belonging to the United States, and that the power to dispose of such property is expressly granted to the Congress by paragraph 3 of article 4 of the Constitution, which expressly gives to the Congress the power to dispose of and to make all needful rules and regulations respecting the territory or other property of the United States. We thus submit that this Court has held that

in so far as the Tennessee Valley Authority has been granted by Congress power to produce electric energy and to dispose of it according to the judgment of its directors and within the very broad and indefinite directions of the Act, it is exercising quasi-legislative power.

Ashwander v. *Tennesse Valley Authority*, 297 U. S. 288 (1936).

Incident to the sale of electric power is the fixing of the method and the rates at which power is to be disposed of, not only to the immediate purchaser but also (in the case of sales to municipalities and other public bodies) to the consumer. Rate making as to businesses affected with a public interest has repeatedly been held to be a legislative function.

Interstate Commerce Commission v. *Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479 (1897).

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908).

Commonwealth of Pennsylvania v. *Benn*, 284 Penn. 421 (1925).

It would seem that the Court below did not consider the rate making of the Authority to be legislative in character because the disposal of power is by contract and not by order after a hearing as in the case of state commissions. The commission procedure is in part quasi-judicial. It is also quasi-legislative. In the end the rate the consumer must pay is fixed. Precisely the same result is reached by the quasi-legislative action of the Authority. It contracts, for example, with the City of Knoxville but under the Act it may and does fix the rates which the consumers (not a party to the contract) must pay. Thus by a different route

the users of electricity in the City of Knoxville are dealt with finally in the same manner and with like effect as if the rates were fixed by the Tennessee commission.

The Authority has the power of eminent domain under Section 4(h) and this is one of the most important powers it possesses to achieve the purposes of the Act. The power to exercise the right of eminent domain has always been held to be legislative.

Monongahela Navigation Co. v. *United States,* 148 U. S. 312 (1893).

Section 4(e) gives the Authority power to adopt, amend and repeal By-Laws, which in effect are private statutes for the governing of its own affairs. This clearly is quasi-legislative, and was so held by the Court below.

Republican Mountain Silver Mines v. *Brown,* 58 Fed. 644 (1893).

By Sections 4(j) and 14(2) and (3) the directors were required to investigate and report to Congress their analyses and recomendations for the unified development of the Tennessee River system and the allocation of costs as to flood control, navigation, fertilizer, national defense and power development. This is a power similar to that lodged in the Federal Trade Commission. It is a legislative power.

Humphrey's Executor v. *United States,* 295 U. S. 602 (1935).

We need not discuss in detail the many other quasi-legislative powers granted to the Authority and exercised by its directors. We may turn to the words of the General Manager of the Authority for a description of the broad scope of the functions of the Authority. In an address before the American Political

Science Association and The American Society for Public Administration at Chicago on December 30, 1940 (T. V. A. Release December 30, 1940), he said (pp. 1-2):

> "The Tennessee Valley Authority is a Federal agency set into a major region designed to achieve certain major objectives of regional and national significance; the form, character, and administrative attributes of the Authority express the assumed workability of planning and execution that go hand in hand and that are so closely meshed in the fabric of the administrative processes as to make it academic to distinguish between planners and administrators. As we in the Authority view the problem of regional planning as applied to the Tennessee Valley, our task is to help mobilize and stimulate thinking, effort, and action of all qualified agencies, organizations, and individuals who can play a significant role in strengthening the economic base and structure of the Valley. We are concerned both with objectives *and* methods. Indeed the development of democratic methods of leadership and cooperation is a TVA *objective.*"

Again he said (p. 15):

> "In addition to the responsibilities comprising an action program, the Authority has been given broad powers of survey, demonstration, and special study, the results of which are designed to illuminate administrative decision and to provide the basis for new legislation. These powers are detailed in large part in sections 5, 10 and 22 of the Act, which I commend to your reading."

Thus we must conclude that the fundamental important functions of the Tennessee Valley Authority are legislative in character. These functions are primary. They must be exercised *before* the directors may even begin most of their purely administrative acts. This was clearly the intent of the Congress. It is not pertinent or relevant to say that some of these functions

might have been delegated to the Secretary of War or to some other member of the Cabinet. Some functions by the terms of the Act have been delegated to the President. This does not change the character of the functions; nor does it make the President a legislative officer. But if the same functions were delegated to an independent board or commission, then the members of such board or commission would be quasi-legislative officers.

For present purposes we may look upon legislative power as of two kinds, that which can be delegated and that which cannot be delegated. The *Schechter* case is an illustration of the latter.

> *Schechter Corporation* v. *United States,* 295 U. S. 495 (1935).

There no primary standards were fixed and the whole plan involved a practical abdication by Congress. But, given a primary standard, an agency of the Government other than Congress by delegation may fill in the details. Legislative power so delegated does not become executive power merely because it is exercised by an executive officer. If in its nature it is legislative, it remains legislative no matter who exercises it. Whether the Secretary of War or the Tennessee Valley Authority fixes the location and height of dams, each is exercising legislative power of the type which properly may be delegated. Here broad quasi-legislative power which the Congress may well delegate, has been delegated not to an executive officer but to an independent corporation created for the express purpose of exercising these powers. The corporation is thus primarily a quasi-legislative body.

The Tennessee Valley Authority Act Clearly Restricts the Right of the President to Remove a Director to the Express Grounds Stated in Section 6 of the Act.

The Act contains but two provisions relative to the removal of officers of the Tennessee Valley Authority. These are found in Section 6 and Section 4(f). The former reads:

> "Sec. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

This provision gives but one cause for removal by the President, and no other ground or basis for removal by him is found anywhere else in the Act.

If an Act of the Congress provides only certain causes for removal of an officer whose office it creates, all other causes are excluded. When the subject of removal obviously is in the legislative mind and only one cause is mentioned, the intention is to exclude all but the one mentioned. Here the President is given the power to remove for one cause only. He therefore does not possess the power to remove in any other situation. Nor can it be material that the provisions of Section 6 are mandatory. If the word were "may" instead of "shall" the duty of the President to remove a director who had violated Section 6 would be clear.

The intent of Congress to keep for itself the power

of removal and to limit the power of the President to remove to the causes stated in Section 6 is shown conclusively by Section 4(f) of the Act which reads:

> "* * * any member of said board may be removed from office at any time by *concurrent* resolution of the Senate and the House of Representatives."

Here by a concurrent resolution, effective without the signature of the President, the Congress dealt completely with the subject of removal. Had there been no other provision in the Act with respect to removal of a director, the intent of the Congress to exclude the power of the President to remove would have been clear. To assert that the Congress may not have the power under the Constitution to provide for removal by a vote of its members is beside the point. It cannot be material in determining the intent of the Act. It might become material, if at all, had Congress made no other provision for removal. If the decision of the Court below is to stand, then a director of the Tennessee Valley Authority may be removed at will by the President and as well at will by the Congress.

There are other considerations which must not be overlooked in determining the intent of Congress. The Act must be construed as an entirety. Any particular section must be construed in connection with other provisions of the Act.

In the first place, the directors are appointed for fixed terms of nine years, extending always beyond any one presidential term and generally beyond two terms. This was to give stability to the board to prevent frequent changes of personnel and to make possible the making and carrying out of fixed policies. It is inconsistent with power in the President to remove members at will or for causes other than those stated in Section 6.

Again the Tennessee Valley Authority was not attached to or placed under any executive department of the Government. It is not responsible to any member of the Cabinet. It is independent. It is the agent of the Congress and not of the President.

The best statement of the position of the Tennessee Valley Authority in the Government set-up without doubt is that of Senator Norris, known as the "father" of the Authority, in the debate on the Reorganization Bill, on March 16, 1938. He said (83 Cong. Rec. 4648):

> "* * * The very theory of the Tennessee Valley Authority Act itself was to make the organization independent of any department, independent of any President, independent of any political change which might come over the country by which we would go from one extreme to another, as the country often does; to put the Tennessee Valley Authority as nearly as possible upon a business basis so that it would be beyond the power of either party, if it came into power at some time to overthrow the Tennessee Valley Authority before it would be possible to have a friendly administration in power."

To give the President the absolute power of removal of the directors, for reason or without reason, would totally defeat the purposes of Congress, which by Section 4(f) reserved to itself the unrestricted power of removal. The asserted power of the President to remove directors at will means complete control of the policies of the Authority; yet it was surely not intended that the President from time to time occupying that office was to have any such control.

The opinion of the Court below refers to the nomination of James P. Pope as "successor" to the petitioner as a director of the Authority, and to his confirmation by the Senate as demonstrating a "lack of legislative purpose to reserve exclusive power of removal." Sub-

stantially the same thing occurred in the matter of Humphrey. He was removed by the President on October 7, 1933. George C. Mathews was nominated for permanent Commissioner on January 4, 1934, and was confirmed by the Senate on January 31, 1934, before the death of Mr. Humphrey. Yet notwithstanding the appointment and confirmation of Mathews, this Court held that there was no vacancy and that Humphrey was illegally removed.

Again, the Court below asserts that to limit the inherent or implied power of the President to remove requires "clear and explicit language" such as is used in the Budget and Accounting Act of 1921. Here again this Court has settled that point. In the Federal Trade Commission Act it was provided that the President might remove a Commissioner for "inefficiency, neglect of duty or malfeasance in office." This was the only provision. Yet this Court held unanimously that the power of the President to remove was limited to those three causes. A removal for another cause was held to be unlawful.

Humphrey's Executor v. *United States,* 295 U. S. 602 (1935).

The Decision in This Case Should Follow That of the Humphrey Case.

The Court below has followed the Myers case, thus in effect holding that the functions and duties of a director of the Tennessee Valley Authority are comparable to that of a postmaster.

Myers v. *United States,* 272 U. S. 52 (1926).

Petitioner asserts that these functions and duties are not at all comparable; that for the purpose of

applying the law to the facts of this case, they must be placed in the same class as the functions of a Federal Trade Commissioner and that therefore the rule in the Humphrey case should be applied.

Humphrey's Executor v. *United States*, 295 U. S. 602 (1935).

That the Tennessee Valley Authority is not the agency or arm of the Executive, but that it is the agency or arm of the Congress, is clear from the express provisions of the Tennessee Valley Authority Act. A director's duties and authority are not in the least like or comparable to the duties of a postmaster. A postmaster is a part of one of the executive departments of the government. He has restricted and specific duties. He handles mail, issues post office money orders, receives postal savings deposits—all with the exercise of very little of his own judgment. He does not fix postage rates. Congress has fixed the rates. He has nothing to do with establishing mail routes. He reports only to his superior and not to Congress.

A director of the Tennessee Valley Authority, on the other hand, is entrusted with wide power and discretion to carry out the policy of Congress as stated in the Act. He acts, not individually, but as a member of a board with broad powers and authority—a sort of legislature in itself. He is a picked man. The President may not appoint whom he chooses. A director must have no financial interest in any public utility corporation distributing and selling power to the public. He must have no financial interest in any fertilizer concern or in any business that may be affected adversely by the success of the Corporation as a producer of concentrated fertilizer, or of electric power (Tennessee Valley Authority Act, Section 2(f)). He must

profess belief in the feasibility and wisdom of the Tennessee Valley Authority Act (Section 2(h)).

He, with his co-directors, may acquire real estate for the construction of dams, reservoirs and other structures and navigation projects at any point along the Tennessee River or any of its tributaries (Section 4(i)). He *may* construct dams and reservoirs, power houses and transmission lines. He must plan for the unified development of The Tennessee River System and report to the Congress. He may advise and cooperate in the readjustment of population displaced by the construction of dams and reservoirs. He has broad powers with respect to fertilizers in the way of making contracts with commercial producers, cooperation with farmers, experimental stations, etc. He is authorized to manufacture and sell fixed nitrogen, fertilizer and fertilizer ingredients by using existing facilities, by modernizing existing plants or by any other process that in his judgment shall appear wise and profitable and he may give away or sell such fertilizer as prescribed by the Act.

He may buy existing power facilities. He may install power apparatus, fix the price for the sale of power to wholesale purchasers, and in turn fix the rates to be paid by the consumer (Sections 10, 12). He must report certain things to the Congress alone, and make an annual report to the President and the Congress. He must furnish data as a guide to the Congress in future legislation. These are but some of his powers, but they are sufficient to show the *character* of his office.

Turning to the opinion of this Court in the *Humphrey* case, it will be seen that the two questions which the Court of Claims there certified to the Supreme

Court are in effect the same questions presented in this case; and they should be answered in the same way.

In the first place, the Tennessee Valley Authority, like the Federal Trade Commission, is a distinct and separate entity, not attached to or working under any executive department of the Government, and, with respect to the powers and authority which it may exercise, it is designed to be wholly free from executive control.

In the second place, the directors of the Corporation are appointed for definite terms of nine years. Precisely the same situation prevails as to appointments to the Federal Trade Commission, save only that the term is seven years.

Again this Court said (page 628) that "The Federal Trade Commission is an *administrative* body created by Congress to carry into effect legislative policies embodied in the statute." (Italics added.) The same thing may be said of the board of directors of the Tennessee Valley Authority. The board is charged primarily with carrying into effect the legislative policy with respect to the unified control and utilization of water and other resources of the entire Tennessee Valley.

In the *Humphrey* case this Court (page 628) said of the Federal Trade Commission "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." Precisely the same situation applies to the board of directors of the Tennessee Valley Authority.

In the *Humphrey* case this Court said (page 628) referring to the Federal Trade Commission that "in

making investigations and reports thereon for the information of Congress under Section 6 in aid of the legislative power, it acts as a legislative agency." Clearly the board of directors of the Tennessee Valley Authority do precisely the same thing, when they report to the Congress on a unified plan for the whole Tennessee River, when they must keep their accounts, "for the purpose of accumulating data useful to the Congress in the formulation of the legislative policy" and when they must make annual reports of all their doings to the President and to both houses of Congress.

Moreover, in the provisions of Section 26(a) of the Act which require the directors to pass upon structures to be erected upon the Tennessee River and its tributaries, *we have not only a clear case of quasi-legislative authority, but also a quasi-judicial function.*

The principles which determine the decision in this case indubitably are different from those in the *Myers* case. Here the facts are much nearer those of the *Humphrey* case. The decision in the *Myers* case goes no further than to say that a first-class postmaster, a *purely* executive officer, may be removed by the President even though a statute provides that he is to be removed by the President with the consent of the Senate. This Court has gone no further than that. Here we have a totally different type of officer to deal with—an officer, not of the Government, but of *a Government corporation separate and independent of the executive and, with respect to its primary and most important functions, exercising far-reaching quasi-legislative powers as the agency of Congress and in no sense as the agency of the executive. These quasi-legislative functions are fundamental and must be exercised before the more simple administrative functions can be exercised at all.*

In the case of the directors of the Tennessee Valley Authority the Congress had the power to limit the power of the President to remove; and by the Act it expressed its clear and unequivocal intention so to limit that power.

Thus, therefore, we submit that the petition for certiorari should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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